

Supreme Court, U.S.

FILED

JUN 8 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

GLENN M. GREENWALD, PETITIONER

v.

CITY OF NORTH MIAMI BEACH, FLORIDA, and
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE
FEDERAL RESPONDENT IN OPPOSITION

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Solicitor General
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Washington, D.C. 20530

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No. 78-1540

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FEDERAL RESPONDENT IN OPPOSITION**

Petitioner, who had been a chemist for the City of North Miami Beach, was fired on August 26, 1977 (Pet. App. 16a). At no time after August 25, 1977, did petitioner work for the City. Petitioner appealed the decision to the local Civil Service Board which, on December 1, 1977, upheld his dismissal (*ibid.*). On December 21, 1977, 117 days after being dismissed, petitioner filed with the Secretary of Labor a complaint alleging that his dismissal violated the Safe Drinking Water Act, 42 U.S.C. 300f to 300j-9. The Secretary, following the recommendation of the Administrative Law Judge (Pet. App. 16a-20a), dismissed petitioner's complaint because it was not filed within 30 days, as 42 U.S.C. 300j-9(i)(2)(A) requires (Pet. App. 7a-8a). The

court of appeals agreed with the Secretary's position and dismissed the petition for review (587 F. 2d 779; Pet. App. 1a-5a). The decision is correct, and there is no reason for review by this Court.

Petitioner did not file his complaint with the Secretary of Labor until ~~almost~~ 117 days after he was fired. But 42 U.S.C. 300j-9(i)(2)(A) requires complaints to be filed within 30 days of the date of the alleged violation. The alleged violation was the dismissal itself. Petitioner could have filed a complaint immediately; no provision of the Act requires the exhaustion of state or local remedies. Because any state and federal remedies for the discharge are independent, petitioner's resort to a local remedy did not extend the time in which to seek the federal remedy.¹ *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).²

Petitioner's contention that this case conflicts with *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965), is incorrect. *Burnett* held that a statute of limitations was tolled during the pendency of an identical action in state court. As the Court pointed out in *Robbins & Myers*, *supra*, 429 U.S. at 237-238, the two actions involved in *Burnett* were not "independent"; because they involved the same claim one had to wait for the other. Here,

¹Petitioner's allegation that the local Civil Service Board did not hold a timely hearing is irrelevant.

²In *Robbins & Myers* a discharged employee immediately pursued internal grievance procedures. Eighty-four days after the company, acting under those procedures, had denied the grievance, but 108 days after the discharge, the employee filed a charge of racial discrimination with the EEOC. The Act on which the employee premised her complaint provided that complaints must be filed with the EEOC within 90 days. This Court rejected the employee's claim that pursuit of her grievance procedure tolled the time limitation within which to file her discrimination complaint with the EEOC.

however, the local Civil Service Board procedure and the federal remedy are entirely independent, and both could go forward to conclusion simultaneously without regard to the other proceeding.

Finally, contrary to petitioner's contention (Pet. 13-15), the present case is not in conflict with *Dartt v. Shell Oil Co.*, 539 F. 2d 1256 (10th Cir. 1976), aff'd by an equally divided Court, 434 U.S. 99 (1977). *Dartt* held that the requirement of giving the Secretary of Labor "notice of intent to sue" under the Age Discrimination in Employment Act is not "jurisdictional" but is more like a statute of limitations, which "should be interpreted as being subject to possible tolling and estoppel." 539 F. 2d at 1260-1261. But the assumption that the Safe Drinking Water Act's time limit can be tolled does not assist petitioner because here, just as in *Robbins & Myers*, tolling is inappropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JUNE 1979